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IN THE

Supreme Court of the United States

October Term, 1961

No. 461

POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE POLICE INC. and JOHN H. McCADDIN,

Petitioners,

v.

ROBERT J. TRAINOR, District Attorney of Westchester County, State of New York, and ARTHUR CORNELIUS, JR., Superintendent of State Police of the State of New York,

Respondents.

On petition for a writ of certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT J. TRAINOR
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Opinions Below

The opinion of the County Judge of Westchester County, is unreported and is printed in Appendix B to petition, p. 20. The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, is reported in 9 App. Div. 2d, 929, 195 N. Y. S. 2d, 109, and is printed in Appendix B of petition, p. 20.

The opinion of the Court of Appeals of the State of New York, is reported in 9 N. Y. 2d, 863, 215 N. Y. S. 2d, 513, and is printed in Appendix B of petition, p. 21. The opinion of the Court of Appeals of the State of New York, denying petitioner's motion to amend the remittitur (not yet reported) is printed in Appendix B of petition, p. 25. The opinion of the Court of Appeals of the State of New York denying petitioner's motion for reargument (not yet reported) is printed in Appendix B of petition, p. 24.

Jurisdiction

Respondent represents to the Court as follows:

1. In the above entitled case an opinion was rendered and judgment entered on March 30, 1961 by the Court of Appeals of the State of New York.

2. The petition was filed on October 2, 1961, more than ninety days since the entry of judgment by the Court of Appeals, and the period for applying for a Writ of Certiorari had not been extended by a Justice of this Court (U. S. C. Title 28, §2101 (c) and Rule 22 of this Court.)

3. Although its citation was apparently inadvertent, 28 U. S. C., §1254(3), cited by petitioners as the basis for this Court's jurisdiction at page 2 of the petition, does not apply to review of judgments of state courts.

Question Presented

Does the fact that New York State law does not provide for an appeal from a denial of a motion to vacate a search warrant violate the due process clause of the Fourteenth Amendment of the Constitution of the United States?

Statutes Involved

Code of Criminal Procedure, State of New York, 517.

Statement

On February 19, 1959, Honorable Hugh S. Coyle, the then County Judge of Westchester County and now a Justice of the Supreme Court of the State of New York, signed several search warrants, including the one describing the office of the Police Benevolent Association of the New York State Police, Inc. (hereinafter referred to as P.B.A.), at 170 Broadway, Borough of Manhattan, City of New York. This was also the office of John H. McCaddin, the Secretary Treasurer and General Counsel of the P.B.A.

An investigation by the New York State Police had been underway in Westchester County for some period of time as the result of complaints received from various business concerns in New York State and other states of alleged improper solicitation of funds by the New York State Police and or the P.B.A. (fol. 111).* The complaints were that the telephone solicitors were representing themselves to be members of the New York State Police, and that by implication those who did not contribute towards the publication of the P.B.A. Fifteenth Anniversary Year Book for 1959 would find themselves in difficulty with the New York State Police.

Petitioner, John H. McCaddin, a former New York State Trooper and Secretary-Treasurer and General Counsel of the P.B.A., had entered into a contract on behalf of the P.B.A. with one Charles Stone of White Plains, New York, a professional fund raiser, for the solicitation of funds in connection with the publication of the aforemen

* References to Record on Appeal, Court of Appeals, State of New York

tioned year book (fols. 26-7; 110). The contract provided for the solicitation of funds by mail only. In consideration for the services to be rendered by Stone, he was to be paid 45¢ out of every dollar received as a result of the solicitations for advertisements in the aforementioned year book, and the remaining 55¢ was to be turned over to the P.B.A. (fols. 27-31). In practice, the P.B.A. received only 40¢ out of every dollar.

On February 19, 1959, simultaneous raids were made at four different locations by the New York State Police. In each instance the Police were armed with a search warrant issued by the County Court of Westchester County. The office of the P.B.A. at 170 Broadway in the City of New York was searched pursuant to the warrant during business hours, and in the presence of petitioner John H. McCaddin, Secretary-Treasurer and General Counsel for the P.B.A. A receipt for the property seized was left with petitioner, pursuant to Section 803 of the Code of Criminal Procedure (exh. 1; fols. 43-96). The warrant for the P.B.A. office was executed by Sergeant J. W. Monahan of the New York State Police and John J. McKeon of the Westchester County District Attorney's Office. It is of interest to note that Sergeant Monahan was an enrolled member of the P.B.A. at the time of the execution of the warrant.

At the time of the investigation, and when the searches were conducted in this matter by the New York State Police concerning its own fraternal organization, the petitioner McCaddin was a suspect in the investigation along with Stone, since he had arranged the hiring of Stone and follow up literature was signed by him as an official of P. B. A.

Within a short time after the material was seized on February 19, 1959 at the office of the P.B.A., most of the items were offered back to the petitioner on a voluntary basis (fols. 121-126). It was not until June of 1959 that petitioners got around to picking up the items in question. A receipt for the items returned was signed by Arthur L. Reuter, Counsel for the petitioners in this proceeding.

It is important to note that the voluntary offer to return the seized items was made in late February and early March of 1959, and preceded the application made by the petitioners to the County Court of Westchester County for vacation of the search warrant and the return of the seized items, made on April 28, 1959. It is of interest that the addressograph machine and membership cards prominently mentioned at page 2 of the petition were among the items contained in the original offer of return and eventually picked up by petitioners in June, 1959 (fols. 121-126).

The April, 1959, Grand Jury of Westchester County handed up an indictment against Charles S. Stone charging him with the crimes of Fraudulently Obtaining Property for Charitable Purposes in violation of Section 934 of the Penal Law, Grand Larceny in the Second Degree committed by the use of fraudulent and false representations, and a common law count of Grand Larceny in the Second Degree (fol. 108). This same Grand Jury on June 25, 1959, handed up indictments against three employees of Charles S. Stone, and a superseding indictment against Charles S. Stone, charging them with similar violations of the Penal Law. Petitioner, John H. McCaddin was advised of his right to appear before the Grand Jury to testify in his own behalf, and he agreed to do so under a Waiver of Immunity. The Grand Jury returned no indictment against McCaddin. One hundred and sixty-two exhibits were introduced into evidence before the Grand Jury including items seized from the office of the P.B.A.

One of the defendants, an employee of Charles S. Stone, entered a plea of guilty to the reduced charge of Falsely Personating a Police Officer, under Section 931 of the Penal Law of the State of New York, on March 11, 1961. A trial of the remaining defendants is scheduled for November 13, 1961 in the County Court of Westchester County.

ARGUMENT

I

There is no question of Federal Law.

The Court of Appeals of the State of New York, by order and judgment, dated March 30, 1961 (the subject of this petition), affirmed the order and judgment of the Appellate Division of the Supreme Court which dismissed an appeal from an order of the County Court of Westchester on the grounds that there was no right of appeal.

The petitioners moved for reargument in an attempt to amend the remittitur to read that the Federal constitutional questions urged here were considered. The motion was denied and the Court of Appeals of the State of New York stated specifically that the Federal constitutional questions "were not considered in view of our holding that there is no statutory authority providing for an appeal from an order of this nature".

It is well settled that there is no constitutional right to appeal in New York State in non-capital criminal cases, and that the sanction for such an appeal must be explicitly granted by the Legislature.

> Constitution of the State of New York, Article 6, §7, 8
> *People* v. *Zerillo*, 200 N. Y. 443, 93 N. E. 1108
> *People* v. *Reed*, 276 N. Y. 5, 11 N. E. 2d 330
> *People* v. *Gersewitz*, 294 N. Y. 163, 61 N. E. 2d 427

This honorable Court has clearly stated its own limitations on review of state court cases as follows:

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge Federal rights, and our power is to correct wrong judgments, not to revise opinions."
>
> *Herb* v. *Pitcairn*, 324 U. S. 117, 125-126.

The record reflects that the judgment which the petitioners seek to review here rests solely upon an adequate and independent non-federal ground. This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon such a non-federal ground. *Murdock* v. *Memphis*, 20 Wall., 590, 636; *Berea College* v. *Kentucky*, 211 U. S. 45, 53; *Fox Film Corp.* v. *Müller*, 296 U. S. 207.

There was New York authority squarely in point which was cited by the Appellate Division in its opinion dismissing the appeal. *People* v. *Ruth*, 250 App. Div. 819 (N. Y. 4th Dept.).

The only question decided by the New York courts was one of state appellate procedures, controlled by state law. This Court, in *John* v. *Paullin*, 231 U. S. 583, 585, has delineated state power in this area as follows:

> "Without any doubt, it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."

II

Assuming *arguendo* that a federal question was presented, it is not of sufficient importance to merit review by certiorari.

The petitioners stand in a unique position in that they are not defendants in the pending criminal trial. Those defendants are not precluded from objecting to the introduction of evidence if illegally obtained.

The situation at bar would not have the far reaching consequences petitioners suggest to this Court, in that the facts of this case are peculiar unto themselves. In ordinary circumstances, a subpoena duces tecum would have been employed, but for the fact that petitioners, by their involvement in the hiring of Stone, and the following up of solicitations, were targets of the investigation at the time that the search warrant was executed. The failure to have utilized the search warrant at this time might well have defeated enforcement of the law.

In further support of the argument that this is not a matter of substance is the unalterable fact that petitioners did not fully utilize the remedies available to them under state law. Petitioners did not seek a hearing pursuant to Sections 807 and 809 of the Code of Criminal Procedure. Furthermore, they failed to invoke the criminal sanctions provided by New York law for those violating the statutes governing the issuance and execution of illegal search warrants. (Code of Criminal Procedure, Section 811; Penal Law, Section 1786.)

It is manifest that the action of the County Court was not arbitrary. The affidavit in support of the search warrant meets the technical requirements of the New York statute in that deponent stated in substance that he had been investigating violations of the Penal Law provisions concerning Extortion and the Fraudulent Obtaining of Property for Charitable Purposes (felony) and that a search warrant would reveal that the articles were used in the aforesaid operation. (See petition, Appendix A, pp. 14-18.)

The dearth of reported cases of attempted appeals by non-defendants from adverse rulings on motions to vacate search warrants further demonstrates that this case does not have the far reaching consequences urged by petitioners. A diligent search by respondents revealed only one reported case of an attempted appeal in the situation presented by the instant case over the period of many years

that the present procedures have been in effect. Furthermore, the ruling there was identical with the holding of the New York courts in the matter at bar. (*People* v. *Ruth*, *supra.*)

The petitioners' own procrastination in retrieving the bulk of the evidence voluntarily offered by respondents and their failure to move to vacate the search warrant until some time after the offer to return was made, belies the importance now attributed to the matter by the petitioners and clearly indicates that the case at bar does not warrant the exercise by this Court of its discretion to review by certiorari.

CONCLUSION

For the foregoing reasons, and because petitioners have failed to satisfy the criteria established in Rule 19 of the Rules of this Court governing review on certiorari, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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